Chronological List of Docket Entries
Schein v. *Chasen*

IN THE COURT OF APPEALS

No. 72-1373

DATE	PROCEEDINGS
2-14-72	Filed copies of docket entries and notice of appeal.
3-16-72	Filed copies of docket entries and notice of appeal (Gregorio) (& in 72-1375).
4- 5-72	Filed record (original papers of district court).
4- 5-72	Filed record (original papers of district court). (71 Civ. 1925). (Filed in 72-1375).
5-15-72	Filed order extending time to file appellant's brief and appendix to 6-14-72 (Schein).
5-15-72	Filed order extending time to file appellant's brief and appendix to 6-14-72 (Gregorio) (Filed in 72-1375).
6-14-72	Filed appendix with proof of service (& in 72-1375).
6-14-72	Filed brief, appellants with proof of service (& in 72-1375).
7-11-72	Filed order extending time to file appellees brief to 8-15-72 (& in 72-1875).
7-20-72	Filed motion for leave to file supplemental appendix with proof of service (& in 72-1375) (Simon).
7-21-72	Filed motion for leave to file supplemental appendix with proof of service (Lehman) (and in 72-1375).

Chronological List of Docket Entries
Schein* v. *Chasen

DATE	PROCEEDINGS
7–21–72	Filed order granting leave to file a supplemental appendix (Simon).
7–21–72	Filed order granting leave to file a supplemental appendix (Lehman) (& in 72-1375).
7–26–72	Filed notice of appearance.
8–15–72	Filed brief, appellees (IDS, IVPF and IDS New Dimensions Fund, Inc.) with proof of service (& in 72-1375).
8–15–72	Filed supplemental appendix, (Simon and Lehman) with proof of service (& in 72-1375).
8–15–72	Filed brief, appellees (Simon and Lehman) with proof of service (& in 72-1375).
8–24–72	Filed order extending time to file appellant's reply brief to 9/13/72.
9–12–72	Filed stipulation (endorsed) extending time to file reply brief to 10-4-72.
10– 3–72	Filed reply brief, appellant with proof of service (& in 72-1375).
10–17–72	Argument heard by: Waterman, Smith, Kaufman, CJJ (& in 72-1375).
5–10–73	Judgment Reversed and Action Remanded, Waterman, CJ (& in 72-1375).
5–10–73	Dissenting in separate opinion, Kaufman, CJ (& 72-1375).
5–10–73	Filed judgment (& in 72-1375 Greg v. Lums) w/c.
5–24–73	Filed itemized and verified bill of costs.

Chronological List of Docket Entries
Schein v. *Chasen*

DATE	PROCEEDINGS
5–24–73	Filed petition for rehearing and rehearing en banc, p/s (IDS, etc.) (& in 72-1375).
5–24–73	Filed petition for rehearing in banc, p/s (Lehman Bros.).
5–24–73	Filed petition for rehearing in banc, p/s (Simon).
6– 8–73	Filed order denying petition for rehearing in banc (Lehman Bros.).
6– 8–73	Filed order denying petition for rehearing in banc (Simon).
6–18–73	Filed order denying petition for rehearing (IDS).
6–18–73	Filed order denying petition for rehearing in banc (IDS).
7–24–73	Filed statement of costs.
7–24–73	Issued Mandate (opinion, judgment & statement of costs).

Chronological List of Docket Entries
Gregorio v. *Lum's, Inc.*

IN THE DISTRICT COURT

(No. 71 Civ. 1925):

ANTONE F. GREGORIO, individually and as representative of all persons similarly situated as a class under Rule 23 FRCP,

Plaintiff,

against

LUM'S, INC., MELVIN CHASEN, LEHMAN BROTHERS, BENJAMIN SIMON, INVESTORS DIVERSIFIED SERVICES, INC., EUGENE C. SIT, JAMES R. JUNDT,

Defendants.

DATE	PROCEEDINGS
4–30–71	Papers originally filed in Northern District of Illinois, Chicago 60604, were this day filed:— Complaint, Designation, Affidavit, etc. (see papers).
	RECORD OF PROCEEDINGS—S.D.N.Y.
5– 3–71	Filed stip and order that time for defts, Investors Diversified, Eugene C. Sit, and James R. Jundt, to Answer the complaint is extended to 6-11-71 Tenny J.
5–10–71	Filed Order that the time of deft Lum's Inc. to Answer the complaint is extended to 6-11-71 Tenney J.
5–11–71	Filed stip and order that time for deft Lehman Brothers to Answer the complaint is extended to 6-11-71 Tenney J.

Chronological List of Docket Entries
Gregorio v. *Lum's, Inc.*

DATE	PROCEEDINGS
6–15–71	Filed affidavit of service of letter upon attorneys listed.
6–30–71	Placed copy of notice of motion re: Dismiss Complaint. Ret. 7/9/71 in folder. (Filed in 70 Civ. 5355).
6–30–71	Placed copy of Memorandum in support of deft. Lehman Bros.' motion to dismiss in folder. (Filed in 70 Civ. 5355).
7–23–71	Filed Notice of Joinder in Motion (by Royall, Koegel & Wells for deft's. Lum's Inc.) (Filed in 75 Civ. 5355).
7–23–71	Filed Notice of Joinder in Motion (by Donovan, Leisure, Newton & Irvine) for defts. Investors Diversified Services, Inc., Thomas R. Reeves, R. Austin Hume, James A. Murray, Eugene C. Sit and James R. Jundt.
7–23–71	Filed MEMO. END. on copy of motion papers filed 6/30/71. Motion to dismiss granted with leave to plaintiff to replead, if he can, within 20 days hereof. Tyler J.
8–11–71	Filed Amended Complaint, and jury demand.
10– 8–71	Filed Affidavit of service of letter to offices as indicated on 9/28/71.
11– 3–71	Filed Affidavits of service, and Affidavits in support of motion.
11– 3–71	Filed MEMO. END. on motions of James R. Jundt and Eugene C. Sit. The motions are granted dismissing the actions as to defts. James R. Jundt and Eugene C. Sit. It is so ordered. Tyler, J. (Filed in 71 Civil 4218).

Chronological List of Docket Entries
Gregorio v. *Lum's, Inc.*

DATE	PROCEEDINGS
11–15–71	Filed Order Staying All proceedings in this action and 4 others, up to and including 10 days following the filing of orders denying motions to dismiss. (Filed in 70 Civil 5331). (mailed notice).
12–16–71	Filed Opinion #38113, Tyler, J. Deft. Chasen's motion to dismiss is granted. The motions of the remaining defts. to dismiss are hereby granted. In view of these rulings, defendants' alternative motion for a stay of these actions need not be reached. Settle Orders accordingly. Tyler, J. (mailed notice).
12–16–71	Filed Deft. Investors Diversified Service, Inc., Memorandum in Support of Motion to Dismiss. Filed in 70 Civ. 5733.
12–16–71	Filed Deft. Investors Diversified Service, Inc., Reply Memorandum in support of motion to dismiss or stay.
12–16–71	Filed deft. Chasen Reply Memorandum in support of motion to dismiss (Filed in 70 Civ. 5733).
12–16–71	Filed Pltfs'. Schein & Gregorio Memorandum in opposition to defts'. motion to dismiss. (Filed in 70 Civ. 5733).
12–16–71	Filed Deft. Investors Diversified Service Inc. Memorandum in support of motion. (Filed in 70 Civ. 5733).
12–16–71	Filed deft. Lehman Bros. Reply Memorandum in support of motion to dismiss. (Filed in 70 Civ. 5733).

Chronological List of Docket Entries
Gregorio v. *Lum's, Inc.*

DATE	PROCEEDINGS
12–16–71	Filed deft. Lehman Bros. Memorandum in support of motion to dismiss. (Filed in 70 Civ. 5733).
12–16–71	Filed Affidavit of Melvin Chasen in support of certain defendants to dismiss for failure to state a claim. (Filed in 70 Civ. 5733).
12–16–71	Filed deft. Melvin Chasen Affidavit & Notice of joinder in motion on behalf of IDS, Inc., IDS, New Dimensions Fund, Inc., Sit, Jundt & Simon to dismiss complaints before Tyler, J. (Filed in 70 Civ. 5733).
12–16–71	Filed Reply Memorandum in support of motion to dismiss or stay (Filed in 71 Civ. 1925).
1– 6–72	Filed Notice of Settlement and Order. Ordered that the above entitled actions are dismissed with prejudice and without costs. Tyler, J. (mailed notice).
1– 5–72	Filed transcript of Record of Proceedings of 9/30/71.
2– 4–72	Filed Notice of Appeal. (mailed notice).
3–16–72	Filed stipulation and order extending the time by which the records on appeal in actions 71 Civil 1925, 70 Civ. 5733 and 71 Civ. 4218 shall be transmitted to the Court of Appeals, to 3/22/72. (Filed in 70 Civ. 5733) Tyler J.
4– 5–72	Filed Certified Record on Appeal to the U.S.C.A.

Chronological List of Docket Entries
Gregorio v. *Lum's, Inc.*

IN THE COURT OF APPEALS

(No. 72-1375):

DATE	PROCEEDINGS
3–16–72	Filed copies of docket entries and copy of notice of appeal
4– 5–72	Filed record (original papers of district court)
5–15–72	Filed order extending time to file appellant's brief and appendix to 6-14-72
6–14–72	Filed appendix with proof of service (Filed in 72-1373)
6–14–72	Filed brief, appellants with proof of service (Filed in 72-1373)

Pleadings

Complaint in Schein v. Chasen

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 4218 HRT

Plaintiffs Demand A Trial By Jury

JACOB SCHEIN & MARVIN H. SCHEIN,

Plaintiffs,

v.

MELVIN CHASEN, INVESTORS DIVERSIFIED SERVICES, INC., LEHMAN BROTHERS, INVESTORS VARIABLE PAYMENT FUND, INC., BENJAMIN SIMON, IDS NEW DIMENSIONS FUND, INC., EUGENE S. SIT, JAMES R. JUNDT and LUM'S, INC.,

Defendants.

Plaintiffs, by their attorneys Wolf Popper Ross Wolf & Jones, complaining of the defendants, allege upon information and belief, except as to Paragraphs 1, 2, 5 and 7, which are alleged upon knowledge:

1. Plaintiffs, citizens of the State of Maryland, are the owners and holders of the stock of Lum's, Inc. ("Lum's"). They were such owners and holders at the time of the acts and transactions complained of herein and continuously to date.

2. Plaintiffs bring this action derivatively on behalf of and for the benefit of Lum's.

3. Jurisdiction of this action is based upon diversity of citizenship.

4. The amount in controversy exceeds $10,000 exclusive of interest and costs.

5. This action is not a collusive one to confer upon this Court jurisdiction it otherwise would not have.

6. All of the defendants are citizens of states other than Maryland.

7. On December 10, 1970, prior to the institution of four stockholders' suits commenced in the United States District Court and dealing with the same subject matter, plaintiffs commenced a derivative action on behalf of Lum's in the New York State Supreme Court, New York County (*Schein* v. *Investors Diversified Services, Inc., et al.*, Index No. 02968/1971) alleging the same cause of action set forth in this action. On June 17, 1971, an order was entered staying prosecution of that action pending final determination of actions pending in the federal court.

8. Lum's is incorporated in the State of Florida. It transacts business in the State of New York. Its common stock is traded on the New York Stock Exchange, a national securities exchange located in the Southern District of New York. At the relevant times hereinafter alleged, Lum's was engaged principally in franchising fast food restaurants and on September 30, 1969, it acquired Caesar's Palace, a large hotel casino in Las Vegas, Nevada.

9. Investors Diversified Services, Inc. ("IDS") is incorporated in Minnesota. It is licensed to do business and

transacts business in the State of New York. IDS maintains an office for the transaction of business in the Southern District of New York. IDS is the distributor and investment advisor for a number of large mutual funds including Investors Variable Payment Fund, Inc. ("Investors") and IDS New Dimensions Fund, Inc. ("Dimensions").

10. Investors and Dimensions are mutual funds which invest their funds principally in common stocks.

11. Lehman Brothers ("Lehman") is a partnership, engaged in the stock brokerage and investment advisory business with its principal office located in the Southern District of New York.

12. Melvin Chasen ("Chasen") was at the times of the acts and transactions hereinafter alleged the chief operating officer of Lum's.

13. Benjamin Simon ("Simon") was at the times of the acts and transactions hereinafter alleged an institutional salesman for Lehman.

14. At the times hereinafter alleged, Eugene C. Sit ("Sit") was portfolio manager of Dimensions and James R. Jundt ("Jundt") was manager of and an analyst for Investors.

15. In or about November, 1969, Chasen informed approximately sixty members of the securities industry, including Sit and Jundt, at a seminar given by Lum's, that projected earnings for Lum's for its fiscal year ending July 31, 1970 would be approximately $1.00 to $1.10 per share.

16. On or about January 5, 1970, Chasen, by virtue of his position with Lum's and in connection with his fiduciary relationship with Lum's, learned that Lum's earnings estimate for the second quarter ending January 31, 1970 projecting an earnings increase of $3,200,000 was incorrect. He also learned that the earnings would show an increase of only approximately $750,000 for the quarter and per share earnings for the fiscal year ending July 31, 1970 would only be 76 cents per share.

17. On or about January 8, 1970, Chasen divulged the material information set forth in paragraph "16" to Simon and to others presently unknown to plaintiffs prior to the public disclosure of said inside information. Chasen also informed Simon and the others that the disappointing earnings were caused by problems in Lum's restaurant division, lower franchise sales and disappointing results at Caesar's Palace, a Las Vegas hotel casino owned by Lum's. This information was also given prior to its public disclosure.

18. The material non-public information set forth in paragraphs "16" and "17" was confidential, the property of Lum's and could not be used for any private purposes.

19. On or about January 8, 1970, after the close of the stock market, Simon divulged the non-public information set forth in paragraphs "16" and "17" given to him by Chasen to Sit and Simon informed Sit of the confidential nature and source of the information. Sit, in turn, immediately conveyed the information to Jundt, advising him of the source of the information and that it was confidential.

20. Before the opening of the stock market on January 9, 1970, Sit and Jundt, with knowledge of the non-public information set forth in paragraphs "16" and "17" and the nature and source of said information, directed the sale by Investors and Dimensions of their entire stock holdings in Lum's.

21. On the morning of January 9, 1970, Investors sold 43,000 shares of Lum's and Dimensions sold 40,000 shares of Lum's. Others, whose identities are presently unknown to plaintiffs, having received the same confidential information, likewise sold shares of Lum's stock. The sales were executed on the New York Stock Exchange at and about 10:30 A.M. (EST) and prior to 1:30 P.M. (EST) at approximately $17.50 per share. Said transactions were effected prior to the public disclosure of the material information set forth in paragraphs "16" and "17" and without the sellers having made any disclosure of the information and knowing that they had received confidential information that belonged to Lum's.

22. At 1:30 P.M. (EST) on January 9, 1970, the New York Stock Exchange halted trading in Lum's stock pending a company announcement.

23. At or about 2:45 P.M. (EST) on the afternoon of January 9, 1970, defendant Lum's issued the following release which appeared on the Dow Jones News Wire Service (the so-called broad tape):

> Lum's Inc., today announced that projected earnings for the second fiscal quarter will be substantially lower than had been anticipated. As a result, earn-

ings for the first six months of the fiscal year will be approximately 20% lower than the previous year.

Mr. Melvin Chasen, Executive Vice President explained that lower earnings were due to smaller profits than had been anticipated from Lum's Restaurant Corporation and less revenue than had been projected for the second quarter from the Caesar's Palace Division.

Mr. Chasen said he anticipated that second half earnings would be significantly higher.

The Dow Jones announcement was the first public disclosure of the adverse earnings information set forth in paragraphs "16" and "17" above.

24. Trading in Lum's stock was not resumed until 10:00 A.M. (EST) on January 12, 1970. Price and volume activity of Lum's common stock on the New York Stock Exchange from Monday, January 5, 1970, the day defendant Chasen received information concerning Lum's adverse earnings for the second quarter of Lum's fiscal year, through Monday, January 12, 1970 was:

Date	*Vol.*	*Open*	*High*	*Low*	*Close*
1/5	20,600	20¾	21½	20⅜	20½
1/6	12,900	20⅝	20⅝	19⅝	19¾
1/7	13,400	19½	19⅞	19½	19¾
1/8	15,100	19½	19⅝	19	19
1/9	325,500	18⅞	18⅞	16½	16⅞
1/12	393,000	14	14⅝	13	14

25. By reason of the facts set forth above, Chasen had the fiduciary obligation to Lum's and its stockholders not to

divulge the confidential information received by him as Vice-President and Chief Executive Officer of Lum's. In willful and blatant disregard thereof, he tipped off Lehman, Simon and others, knowing they would use this information for their own personal benefit. Chasen thereby violated his fiduciary duties to Lum's. All of the other defendants, other than Lum's and others presently unknown to plaintiffs, aided and abetted Chasen in the violation of his fiduciary duties and used the aforesaid confidential information for their own personal profit. By reason thereof all of the defendants are liable to Lum's for their unlawful profits (including commissions) and are liable to Lum's for the damages it sustained thereby.

26. As a result of the acts and transactions aforesaid, the defendants, other than Lum's, profited and Lum's has sustained substantial damage, the precise amount of which is presently unknown to plaintiffs and ascertainable only upon a full and complete accounting herein.

27. Many of the acts complained of herein were committed in the Southern District of New York, either originating or being consummated herein.

28. Plaintiffs demand punitive damages.

29. Plaintiffs have no adequate remedy at law.

30. Demand upon the Board of Directors of Lum's to bring this action was not made and would have been futile because Chasen is the Chief Operating Officer of Lum's, Lehman has in the past and continues to render substantial investment and advisory services to Lum's and its

Board of Directors and IDS and the selling defendants either control large purchases or are purchasers of large blocks of stock in Lum's. Due to the foregoing, the Board of Directors of Lum's would not prosecute an action against these aforementioned defendants or their employees, or if such suit was brought, it would not be prosecuted diligently.

31. Demand upon the stockholders of Lum's to bring this action was not made and would have been futile because the wrongs to Lum's alleged herein are incapable of stockholder ratification. Under the law the directors and officers, not the stockholders, are vested with the management of Lum's, including the institution of all actions in behalf of Lum's. The stockholders as a body cannot by resolution compel the directors to institute a suit in behalf of Lum's. Such resolution in any event would be futile and useless for the reasons stated in paragraph "30". The stockholders of Lum's are very numerous and are located throughout the United States and abroad. It would place an unreasonable burden and expense on plaintiff, and extended delays would result which would be harmful and prejudicial to the prosecution of this action if plaintiffs were compelled to make such demand on the stockholders.

WHEREFORE, plaintiffs demand judgment:

1. Holding that all the defendants, other than Lum's, account to Lum's for all its losses and damages and pay to Lum's all of the profits derived by them by virtue of the acts and transactions complained of herein.

2. Holding that defendants other than Lum's pay punitive damages.

3. Ordering that plaintiffs be awarded the costs and disbursements of this action, including reasonable counsel and accountants' fees.

4. Granting such other and further relief as this Court may deem just and proper.

WOLF POPPER ROSS WOLF & JONES
By HOWARD L. JACOBS
A Member of the Firm
Attorneys for Plaintiff
Office & P.O. Address
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(Jurat Omitted in Printing)

Amended Complaint in Gregorio v. Lum's, Inc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 1925 HRT

(Jury Trial Demanded)

Shareholders Derivative Action

ANTONE F. GREGORIO,

Plaintiff,

vs.

LUM'S INC., MELVIN CHASEN, LEHMAN BROTHERS, INVESTORS DIVERSIFIED SERVICES, INC., EUGENE C. SIT, and JAMES R. JUNDT,

Defendants.

Plaintiff, ANTONE F. GREGORIO, by his attorneys, alleges of the Defendants as follows:

Jurisdiction and Venue

1. This court has jurisdiction of the parties and subject matter based upon diversity of citizenship. Plaintiff resides in the State of Illinois. All Defendants reside in or are corporations maintaining their principal offices in States other than Ilinois. In addition, the amount in controversy exceeds $10,000 exclusive of interests and costs. This action is not brought to confer jurisdiction upon this Court which it would not otherwise have.

2. The Defendants, Lum's, Inc., Lehman Brothers and Investors Diversified Services, Inc. transact business and

are found within the Southern District of New York. The unlawful acts alleged hereinafter have been performed, in part, within the Southern District of New York.

Plaintiff

3. Plaintiff is a purchaser and owner of the common stock of Lum's, Inc. and is a resident of Illinois.

4. Plaintiff brings this action derivatively on behalf of Lum's.

5. Plaintiff's purchases of Lum's, Inc. were made in 1969, and on January 5, 1970, Plaintiff owned 1,500 shares of common stock, listed on the New York Stock Exchange. Plaintiff has suffered substantial losses from the decline in this security as a result of the unlawful acts of the Defendants named herein.

Defendants

6. Defendant, Lum's, is a corporation which was incorporated under the laws of Florida, having its principal place of business at 5050 Biscayne Boulevard, Miami, Florida. The common stock of Defendant, Lum's, Inc. is traded on the New York Stock Exchange, a national securities exchange which is located in the Southern District of New York. Defendant, Lum's, Inc., is primarily engaged in franchising fast-food restaurants and on September 30, 1969, it acquired Caesar's Palace, a large hotel-casino in Las Vegas, Nevada.

7. Defendant, Chasen, has been the Chief Operating Officer and a director of Defendant, Lum's, Inc., from

October 1968 to the present. On or about February 6, 1970, Defendant, Chasen, became President of Defendant, Lum's, Inc. Chasen dominates and controls Lum's Board of Directors so that if Lum's, Inc. brought this action it would be conducted under the control of the Directors, who are themselves controlled by Defendant, Chasen; thereby leaving Chasen in charge of a lawsuit against himself.

8. Defendant, Lehman Brothers, is a broker-dealer firm located at One Wiliam Street, New York, New York. The firm is registered with the Securities and Exchange Commission as a broker-dealer in securities pursuant to Section 15 of the Exchange Act (15 U.S.C. 78e), is a member of the New York, American and other major stock exchanges, and is also a member of the National Association of Securities Dealers ("NASD").

9. Defendant, Investors Diversified Services, Inc., with its principal offices located at Investors Building, Minneapolis, Minnesota, was established in 1894. It manages investments aggregating some six billion dollars in market value for six open-end registered investment companies. The six companies include Investors Mutual, Inc.; Investors Selective Fund, Inc.; Investors Stock Fund, Inc.; Investors Variable Payment Fund, Inc.; IDS New Dimensions Fund, Inc.; and IDS Progressive Fund, Inc. Defendant, Investors Diversified Services, Inc. is registered with the Securities & Exchange Commission as a broker-dealer in securities pursuant to Section 15 of the Exchange Act.

10. Defendant, Sit, is employed by Defendant, Investors Diversified Services, Inc. He joined Defendant, Investors

Diversified Services, Inc., on August 26, 1968 as an Associate Portfolio Manager of Investors Stock Fund, Inc. and was promoted to the position of Portfolio Manager of Defendant, Investors Diversified Services, Inc.'s IDS New Dimensions Fund, Inc. in November, 1969. His responsibilities include assisting in the management of Investors Diversified Services, Inc.'s six funds. Defendant, Investors Diversified Services, Inc.'s IDS New Dimensions Fund, Inc. had in its portfolio as of January 8, 1970, 40,000 shares of Defendant, Lum's, Inc., common stock with a cost value of approximately $730,000.

11. Defendant, Jundt, has been employed by Defendant, Investors Diversified Services, Inc., since July 28, 1969. He was first employed as an analyst, specializing in the fields of hotels, restaurants, and franchises. In December of 1969, he was promoted to the position of analyst and a satellite manager of the Defendant, Investors Diversified Services, Inc.'s Investors Variable Payment Fund, Inc. On February 18, 1970, Jundt was further advanced to the position of Group Director of the Moderate Growth Group. Investors Variable Payment Fund, Inc. had in its portfolio as of January 8, 1970, 43,000 shares of Defendant, Lum's, Inc., common stock with a cost value of approximately $1,400,000.

Cause of Action

12. During the period from approximately December, 1969 to date hereof, Defendants, Lum's, Inc., Chasen, Leh-

man Brothers, Investors Diversified Services, Inc., Sit and Jundt, singly and in concert, directly and indirectly, in connection with purchases and sales of securities of Defendant, Lum's, Inc., by use of the means or instrumentality of interstate commerce, or of the mails, or of the facility of the New York Stock Exchange, a national securities exchange, have employed and are employing devices, schemes and artifices to defraud, and have been engaging in acts, practices and courses of business which have operated and are operating as a fraud and deceit upon the shareholders of Defendant, Lum's, Inc. and other purchasers and sellers and prospective purchasers and sellers of Defendant, Lum's, Inc., securities.

13. In or about November 1969, at a seminar given by Lum's, Inc. at Caesar's Palace which was attended by approximately sixty members of the securities industry including Defendants, Simon and Sit, Defendant, Chasen, stated that the projected earnings of Lum's, Inc. for its fiscal year ending July 31, 1971 was in the neighborhood of $1.00 to $1.10 per share.

14. On or about January 5, 1970, Defendant, Chasen, received from Lum's, Inc. Assistant Treasurer a revised income schedule entitled "Consolidated Projection of Income—(Revised)," which schedule indicated unexpected and disappointing earnings for the second quarter of Lum's, Inc. 1970 fiscal year ending January 31, 1970. The schedule reflected a revised projected gain for the second quarter of about $750,000, as compared with an original projected

gain of $3,200,000. The schedule also disclosed a revised yearly estimated earnings figure of $0.76 per share for the fiscal year ending July 31, 1971. None of this information had been made public.

15. Defendant, Chasen, conveyed to Defendant, Simon, on or about January 8, 1970, material non-public information concerning the matters set forth in paragraph 14 above and explained to Simon that troubles in the restaurant division, lower franchise sales, and disappointing results at Caesar's Palace were the causes of the disappointing earnings.

16. Thereafter, on January 8, 1970, Defendant, Lehman, conveyed to Defendant, Sit, material non-public information concerning the matters set forth in paragraphs 14 and 15 above.

17. On January 8, 1970, immediately after the above-mentioned telephone conversation, Defendant, Sit, at a meeting in his office communicated material non-public information concerning the matters set forth in paragraphs 14 and 15 above, to Defendant Jundt. Defendants, Sit and Jundt, then decided to sell IDS New Dimensions Fund, Inc.'s entire position of 40,000 shares of Lum's, Inc. common stock and Investors Variable Payment Fund, Inc.'s entire position of 43,000 shares of Lum's, Inc. common stock.

18. On the following morning (January 9, 1970) at about 9:40 A.M. (EST) Defendants, Sit and Jundt, having knowledge and information of non-public material facts

concerning the matters set forth in paragraphs 14 and 15 above, placed an order with Investors Diversified Services, Inc. trading room to immediately sell on behalf of IDS New Dimensions Fund, Inc. and Investors Variable Payment Fund, Inc. their entire holdings of Lum's Inc. common stock consisting of 83,000 shares. The order was executed at about 10:30 A.M. (EST) at approximately $17½ per share on the New York Stock Exchange, without disclosing to the purchasers the aforementioned material nonpublic information concerning Lum's, Inc. The total price of the sale was approximately $1,453,000.

19. Thereafter, at 1:30 P.M. (EST) on January 9, 1970, the New York Stock Exchange halted trading in Defendant, Lum's, Inc., common stock pending a company announcement.

20. At or about 2:45 P.M. (EST) on the afternoon of January 9, 1970, Defendant, Lum's Inc., issued the following release which appeared on the Dow Jones News Wire Service (the so-called broad tape).

> Lum's Inc., today announced that projected earnings for the second fiscal quarter will be substantially lower than had been anticipated. As a result, earnings for the first six months of the fiscal year will be approximately 20% lower than the previous year.
>
> Mr. Melvin Chasen, Executive Vice President explained that lower earnings were due to smaller profits than had been anticipated from Lum's Restaurant Corporation and less revenue than had been projected for the second quarter from the Caesar's Palace Division.

Mr. Chasen said he anticipated that second half earnings would be significantly higher.

The Dow Jones announcement was the first public disclosure of the adverse earnings information set forth in paragraphs 14 and 15 above.

Effects of Violations

21. Trading in Lum's, Inc. stock was not resumed until 10:00 A.M. (EST) on January 12, 1970. Price and volume activity of Lum's, Inc. common stock on the New York Stock Exchange from Monday, January 5, 1970, the day Defendant, Chasen, received information concerning Lum's, Inc. adverse earnings for the second quarter of Lum's, Inc. fiscal year, through Monday, January 12, 1970 varied from a low volume on January 6, 1970 of 12,900 shares to a high on January 12, 1970 of 393,000 and from a high price on January 5, 1970 of 20½ at close to a low of $14 on January 12, 1970.

22. The non-public information was an asset of Defendant, Lum's Inc., and belonged to it. Defendants must account to Lum's Inc. for the profits realized by them.

23. Demand upon the Board of Directors of Lum's Inc. to bring this action would be futile because:

A. The President and chief executive officer of Lum's Inc. is a Defendant in this action. The Directors cannot be expected to cause the corporation to sue its chief executive officer.

B. Defendant, Chasen, dominates and controls Lum's, Inc.'s Board of Directors. If Lum's, Inc. brought this action, the conduct of the suit would be under the control of its Directors who, in turn, are controlled by Defendant, Chasen. Thus, Defendant, Chasen, would be in charge of a lawsuit against himself.

24. A demand upon the shareholders of Lum's, Inc. to commence this action would be a useless act because:

A. The wrong alleged herein constitutes a waste of Lum's, Inc.'s assets for the benefit of the Defendants and cannot be ratified or approved except by the unanimous action of all of Lum's, Inc.'s shareholders.

B. Under the laws of Florida and the charter and by-laws of Lum's, Inc., the management of its affairs, including the institution of all actions on its behalf, rests on the Board of Directors and not on the stockholders.

C. Any stockholder resolution to bring such a suit would be futile, since control of the action would be in the hands of the wrongdoers and could not be properly prosecuted.

D. Such a demand would cause an unconscionable burden on Plaintiff, in that proxies would have to be solicited for the many thousands of Lum's, Inc. shareholders who reside in many states of the union and in foreign countries.

E. Such a demand would result in undue delay, prejudicial to Plaintiff and Lum's, Inc., and would create the danger of barring the claim alleged herein through the statute of limitations and laches.

25. Plaintiff has no adequate remedy at law.

Pleadings

Amended Complaint in Gregorio v. *Lum's, Inc., No. 71 Civ. 1925*

Relief Requested

WHEREFORE, Plaintiff, Antone F. Gregorio, prays for judgment, as follows:

1. Requiring Defendants to account to Lum's, Inc. for the profits made by Defendants, Dimensions Fund and Variable Fund;

2. Assessing punitive damages against Defendants in the amount of $1,000,000;

3. Awarding Plaintiff the costs and expenses of this action, including a reasonable attorney's fee; and

4. Such other and further relief as to this Court may be just and proper.

/s/ EDWARD A. BERMAN
Edward A. Berman,
One of Plaintiffs' Attorneys

LEWIS W. SCHLIFKIN, ESQ.
EDWARD A. BERMAN, ESQ.
134 North LaSalle Street
Chicago, Illinois 60602
ST 2-9120

DEMAND FOR JURY TRIAL

Plaintiffs hereby respectfully demand trial by jury.

/s/ EDWARD A. BERMAN
Edward A. Berman,
One of Plaintiffs' Attorneys

Notice of Motion and Affidavit of Benjamin Simon in Support of Motion to Dismiss the Complaint in No. 71 Civ. 4218

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 4218 HRT

JACOB SCHEIN and MARVIN H. SCHEIN,
Plaintiffs,

against

MELVIN CHASEN, *et al.*,
Defendants.

SIRS:

PLEASE TAKE NOTICE that upon the complaint, the annexed affidavit of Benjamin N. Simon sworn to October 11, 1971 and upon all prior proceedings herein, the undersigned will move before the Honorable Harold R. Tyler on October 22, 1971 at 10:00 A.M., or as soon thereafter as counsel can be heard, in Room 2704 of the United States Courthouse, Foley Square, New York, for an order pursuant to Rule 12 FRCP dismissing this action for lack of personal jurisdiction over defendant Simon and for failure to state a claim upon which relief can be granted, or, in the alternative, for summary judgment in favor of defendant Simon under Rule

56 FRCP, and for such other and further relief as to the court may appear just.

Dated: New York, New York
October 12, 1971

WHITE & CASE

By /s/ DAVID HARTFIELD, JR.
A Member of the Firm
Attorney for Defendant Benjamin Simon
14 Wall Street
New York, New York

To:

SIMPSON, THACHER & BARTLETT
Attorneys for defendant
Lehman Brothers
1 Battery Park Plaza
New York, New York 10004

DONOVAN, LEISURE, NEWTON & IRVINE
Attorneys for defendants
Investors Diversified Services, Inc.
IDS New Dimensions Fund, Inc.,
Investors Variable Payment Fund, Inc.
Eugene C. Sit and James R. Jundt
2 Wall Street
New York, New York 10005

Notice of Motion and Affidavit of Benjamin Simon in Support of Motion to Dismiss the Complaint in No. 71 Civ. 4218

ROYALL, KOEGEL & WELLS
Attorneys for defendants
Melvin Chasen and Lum's, Inc.
200 Park Avenue
New York, New York 10017

WOLF, POPPER, ROSS, WOLF & JONES
Attorneys for Plaintiffs
845 Third Avenue
New York, New York 10022

Notice of Motion and Affidavit of Benjamin Simon in Support of Motion to Dismiss the Complaint in No. 71 Civ. 4218

(Caption Omitted in Printing)

AFFIDAVIT

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

BENJAMIN N. SIMON, being sworn says:

1. I am a defendant in this action, *Schein* v. *Chasen, et al.*, and make this affidavit in support of the within motion to dismiss this action under Rule 12 FRCP for lack of personal jurisdiction and for failure to state a claim or for summary judgment under Rule 56 FRCP.

2. I was personally served with the complaint in this action by a United States Marshal in Chicago, Illinois on September 28, 1971. I live and work in Chicago, where I am employed by Lehman Brothers as an institutional securities salesman. I was living in Chicago, and worked in Lehman Brothers' Chicago office, during the week of January 5, 1970, when the events described in the complaint allegedly took place. Specifically, I was in Chicago on January 8, 1970, when I understand the complaint charges that I received material information from Melvin Chasen of Lum's, Inc. and transmitted such information to Eugene Sit of Investors Diversified Services, Inc. ("IDS"). I did have telephone conversations with Mr. Chasen on January 8, 1970, and with Mr. Sit on January 8 or 9, 1970. Mr. Chasen was in Miami at the time, where Lum's has its principal place of business. Mr. Sit was in Minneapolis,

where IDS is located. I did not receive from Mr. Chasen or transmit to Mr. Sit any material non-public information on January 8 or 9, 1970 or at any other time.

3. My attorneys advise me that the complaint in this action charges that either I or Lehman Brothers profited in some way from the sale by IDS on January 9, 1970 of its 83,000 shares of Lum's common stock. This is not the case. IDS did not sell the 83,000 shares of Lum's through Lehman Brothers and neither Lehman Brothers nor I received any commission or other benefit from the transaction. Neither I nor any member of my family bought or sold any Lum's stock during the period in question.

/s/ BENJAMIN N. SIMON

(Jurat Omitted in Printing)

Notice of Motion of Investors Diversified Services, Inc., *et al.*, to Dismiss the Complaints in Nos. 70 Civ. 5733, 71 Civ. 1925 and 71 Civ. 4218

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civil 5733 HRT

JOSEPH GILDENHORN, as Custodian for CAROL ANN GILDENHORN,

Plaintiff,

against

LUM'S, INC., *et al.*,

Defendants.

71 Civil 1925 HRT

ANTONE F. GREGORIO,

Plaintiff,

against

LUM'S, INC., *et al.*,

Defendants.

71 Civil 4218 HRT

JACOB SCHEIN and MARVIN H. SCHEIN,

Plaintiffs,

against

MELVIN CHASEN, *et al.*,

Defendants.

SIRS:

PLEASE TAKE NOTICE that the undersigned will move before the Honorable Harold R. Tyler, Jr. on October 22,

Notice of Motion of Investors Diversified Services, Inc., et al., to Dismiss the Complaints in Nos. 70 Civ. 5733, 71 Civ. 1925 and 71 Civ. 4218

1971 at 10:00 A.M., or as soon thereafter as counsel can be heard, in Room 2704 of the United States Courthouse, Foley Square, New York, for an order pursuant to Rules 4(e) and 12(b)(2) and (6) of the Federal Rules of Civil Procedure (1) dismissing the complaints and the amended complaint in the above entitled actions as to Investors Diversified Services, Inc., IDS New Dimensions Fund, Inc., Investors Variable Payment Fund, Inc., Eugene C. Sit and James R. Jundt, upon the ground that said complaints and amended complaint fail to state a claim upon which relief can be granted, or, in the alternative, staying said actions pending a final determination in *Sanders* v. *Lum's, Inc., et al.*, 70 Civ. 5331 HRT and (2) dismissing said complaint and amended complaint as to Eugene C. Sit and James R. Jundt, upon the ground of lack of jurisdiction over the person.

Dated: New York, New York
October 12, 1971

DONOVAN LEISURE NEWTON & IRVINE

By /s/ ROGER V. PUGH, JR.
A Member of the Firm
Attorneys for Defendants
Investors Diversified Services, Inc.
IDS New Dimensions Fund, Inc.
Investors Variable Payment Fund, Inc.
Eugene C. Sit and James R. Jundt

To:

SIDNEY B. SILVERMAN, ESQ.
Attorney for Joseph Gildenhorn,
or Custodian for Carol Ann Gildenhorn
233 Broadway
New York, N. Y. 10007

Notice of Motion of Investors Diversified Services, Inc., et al., to Dismiss the Complaints in Nos. 70 Civ. 5733, 71 Civ. 1925 and 71 Civ. 4218

LEWIS W. SCHLIFKIN, ESQ.
EDWARD A. BERMAN, ESQ.
Attorneys for Antone F. Gregorio
134 North La Salle Street
Chicago, Illinois 60602

WOLF POPPER ROSS WOLF & JONES
Attorneys for Jacob Schein and
Marvin H. Schein
845 Third Avenue
New York, N. Y. 10022

WHITE & CASE
Attorneys for Benjamin Simon
14 Wall Street
New York, N. Y. 10005

SIMPSON THACHER & BARTLETT
Attorneys for Lehman Brothers
One Battery Park Plaza
New York, N. Y. 10004

ROYALL KOEGEL & WELLS
Attorneys for Lum's, Inc.
and Melvin Chasen
200 Park Avenue
New York, N. Y. 10017

Notice of Motion and Affidavit of Herbert A. Lisle in Support of Motion of Defendant Lehman Brothers to Dismiss the Complaints in Nos. 70 Civ. 5733, 71 Civ. 1925 and 71 Civ. 4218

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civil 5733

JOSEPH GILDENHORN, as Custodian for CAROL ANN GILDENHORN, *Plaintiff,*

against

LUM'S, INC., *et al.*, *Defendants.*

71 Civil 1925

ANTONE F. GREGORIO, *Plaintiff,*

against

LUM'S, INC., *et al.*, *Defendants.*

71 Civil 4218

JACOB SCHEIN and MARVIN H. SCHEIN, *Plaintiffs,*

against

MELVIN CHASEN, *et al.*, *Defendants.*

SIRS:

PLEASE TAKE NOTICE that upon the complaint, the annexed affidavit of Herbert A. Lisle, sworn to October 13, 1971 and

Notice of Motion and Affidavit of Herbert A. Lisle in Support of Motion of Defendant Lehman Brothers to Dismiss the Complaints in Nos. 70 Civ. 5733, 71 Civ. 1925 and 71 Civ. 4218

upon all prior proceedings herein, the undersigned will move before the Hon. Harold R. Tyler on October 22, 1971 at 10:00 A.M., or as soon thereafter as counsel can be heard, in Room 2704 of the United States Courthouse, Foley Square, New York, for an order pursuant to Rule 12 of the Federal Rules of Civil Procedure dismissing the complaints in the above-entitled actions as to defendant Lehman Brothers upon the ground that said complaints fail to state a claim upon which relief can be granted, or, in the alternative, staying said action pending a final determination in *Sanders* v. *Lum's, Inc., et al.*, 70 Civ. 5331 HRT.

Dated: New York, New York
October 13, 1971

SIMPSON THACHER & BARTLETT
By /s/ JAMES J. HAGAN
A Member of the Firm
Attorneys for Defendant
Lehman Brothers
One Battery Park Plaza
New York, New York 10004

To:

SIDNEY B. SILVERMAN, ESQ.
Attorney for Plaintiff Joseph Gildenhorn, as Custodian for Carol Ann Gildenhorn
233 Broadway
New York, New York 10007

Notice of Motion and Affidavit of Herbert A. Lisle in Support of Motion of Defendant Lehman Brothers to Dismiss the Complaints in Nos. 70 Civ. 5733, 71 Civ. 1925 and 71 Civ. 4218

LEWIS W. SCHLIFKIN, ESQ.
EDWARD A. BERMAN, ESQ.
Attorneys for Plaintiff Antone F. Gregorio
134 North LaSalle Street
Chicago, Illinois 60602

WOLF POPPER ROSS WOLF & JONES
Attorneys for Plaintiffs Jacob Schein and Marvin H. Schein
845 Third Avenue
New York, New York 10022

DONOVAN LEISURE NEWTON & IRVINE
Attorneys for Defendants
Investors Diversified Services, Inc.,
IDS New Dimensions Fund, Inc.,
Investors Variable Payment Fund, Inc.,
Eugene C. Sit and James R. Jundt
Two Wall Street
New York, New York 10005

WHITE & CASE
Attorneys for Defendant Benjamin Simon
14 Wall Street
New York, New York 10005

ROYALL KOEGEL & WELLS
Attorneys for Defendants Lum's, Inc. and Melvin Chasen
200 Park Avenue
New York, New York 10017

Notice of Motion and Affidavit of Herbert A. Lisle in Support of Motion of Defendant Lehman Brothers to Dismiss the Complaints in Nos. 70 Civ. 5733, 71 Civ. 1925 and 71 Civ. 4218

(Caption Omitted in Printing)

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

HERBERT A. LISLE, being duly sworn, deposes and says:

1. I am a member of the firm of Lehman Brothers, one of the defendants in the above-entitled actions. I make this affidavit in support of the motion by said defendant for an order dismissing these actions for failure to state a claim upon which relief can be granted.

2. I am informed that the complaints in these actions charge that on January 8, 1970, Benjamin Simon, a salesman in Lehman Brothers' Chicago office received material information from Melvin Chasen of Lum's, Inc. and transmitted such information to Eugene Sit of Investors Diversified Services, Inc. and that Lehman Brothers profited in some way from the sale by Investors Diversified Services on January 9, 1970 of its 83,000 shares of Lum's common stock. This is not the case. Investors Diversified Services did not sell the 83,000 shares of Lum's through Lehman Brothers and Lehman Brothers did not receive any commission or other benefit from the transaction. Accordingly, I respectfully request that the present motion be granted in all respects.

/s/ HEBRERT A. LISLE

(Jurat Omitted in Printing)

Notice of Joinder in Motion and Affidavit of Melvin Chasen in Support of Motion to Dismiss the Complaints in Nos. 70 Civ. 5733, 71 Civ. 1925, and 71 Civ. 4218

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civil 5733

JOSEPH GILDENHORN, as Custodian for CAROL ANN GILDENHORN, *Plaintiff,*

against

LUM'S, INC., *et al.*, *Defendants.*

71 Civil 1925

ANTONE F. GREGORIO, *Plaintiff,*

against

LUM'S, INC., *et al.*, *Defendants.*

71 Civil 4218

JACOB SCHEIN and MARVIN H. SCHEIN, *Plaintiffs,*

against

MELVIN CHASEN, *et al.*, *Defendants.*

SIRS:

PLEASE TAKE NOTICE that defendant MELVIN CHASEN, by the undersigned, will join in the motion to be made on

Notice of Joinder in Motion and Affidavit of Melvin Chasen in support of Motion to Dismiss the Complaints in Nos. 70 Civ. 5733, 71 Civ. 1925 and 71 Civ. 2418

behalf of defendants Investors Diversified Services, Inc., IDS New Dimensions Fund, Inc., Investors Variable Payment Fund, Inc., Eugene C. Sit, James R. Jundt and Benjamin Simon to dismiss the complaints in the above action before the Honorable Harold R. Tyler, Jr., United States District Judge, Room 2704, United States Court House. Foley Square, New York, New York, on October 22, 1971, at 2:15 P.M., or as soon thereafter as counsel can be heard, in accordance with the Notices of Motion dated October 12, 1971, subscribed by counsel for the above listed defendants.

Dated: New York, New York
October 18, 1971

Yours, etc.

ROYALL KOEGEL & WELLS
By /s/ GUY C. QUINLAN
A Member of the Firm
Attorneys for Defendant Melvin Chasen
200 Park Avenue
New York, New York 10017
Telephone: 972-7000

To:

SIDNEY B. SILVERMAN, ESQ.
Attorney for Joseph Gildenhorn, as Custodian for Carol Ann Gildenhorn
233 Broadway
New York, New York 10007

Notice of Joinder in Motion and Affidavit of Melvin Chasen in support of Motion to Dismiss the Complaints in Nos. 70 Civ. 5733, 71 Civ. 1925 and 71 Civ. 2418

LEWIS W. SCHLIFKIN, ESQ.
EDWARD A. BERMAN, ESQ.
Attorneys for Antone F. Gregorio
134 North La Salle Street
Chicago, Illinois 60602

WOLF POPPER ROSS WOLF & JONES
Attorneys for Jacob Schein and Marvin H. Schein
845 Third Avenue
New York, New York 10022

WHITE & CASE
Attorneys for Benjamin Simon
14 Wall Street
New York, New York 10005

SIMPSON THACHER & BARTLETT
Attorneys for Lehman Brothers
One Battery Park Plaza
New York, New York 10004

DONOVAN LEISURE NEWTON & IRVINE
Attorneys for Defendants
Investors Diversified Services, Inc., IDS New Dimensions Fund, Inc., Investors Variable Payment Fund, Inc., Eugene C. Sit and James R. Jundt
Two Wall Street
New York, New York 10005

Notice of Joinder in Motion and Affidavit of Melvin Chasen in support of Motion to Dismiss the Complaints in Nos. 70 Civ. 5733, 71 Civ. 1925 and 71 Civ. 2418

(Caption Omitted in Printing)

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

STATE OF FLORIDA }
COUNTY OF DADE } ss.:

MELVIN CHASEN, being duly sworn, deposes and says:

1. I am one of the defendants named in each of the above-entitled actions, and am the President of defendant Lum's, Inc. I make this affidavit in support of the motion by certain defendants to dismiss the above actions for failure to state a claim upon which relief can be granted, and as to the individual defendants for lack of personal jurisdiction.

2. I am, and have been at all times referred to in the complaint, a citizen of the State of Florida. I reside at 2085 N.E. 120th Road, North Miami, Florida, and maintain my office at 8515 Biscayne Boulevard, Miami, Florida. I do not maintain, and I have not maintained at any time referred to in the complaints herein either a place of business or a residence in the State of New York. I was not personally served in any of the above actions in the State of New York. Purported service was made on me in the State of Florida.

3. I am informed and believe that the basis of the purported claim in these actions relates to alleged telephone conversations between myself and Benjamin Simon on January 8, 1970. I do not admit the truth of plaintiffs' allegations as to the content of such conversations, and if this

action is tried the evidence will show that I was not guilty of any improper or unlawful act. However, I believe it is undisputed that the only telephone conversations I had with Mr. Simon on the dates in question were between my office in Miami, Florida, and Mr. Simon's office in Chicago, Illinois.

4. I did not, at any time referred to in the complaints herein, buy or sell any stock of defendant Lum's, Inc. No member of my family, and no company in which I hold any interest, bought or sold Lum's stock at such time. I am advised that there is no allegation that I individually profited as a result of any of the matters alleged in the complaints, and in fact I did not profit with respect to any of the alleged matters or transactions referred to.

WHEREFORE, I respectfully request that the motions to dismiss be granted.

/s/ MELVIN CHASEN

(Jurat Omitted in Printing)

Opinion of the District Court
Dated December 15, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Nos. 70 Civ. 5733, 71 Civ. 1925 and 4218

JOSEPH GILDENHORN, as Guardian for Carol Ann Gildenhorn,

Plaintiff,

v.

LUM'S INC., *et al.*,

Defendants.

ANTONE F. GREGORIO,

Plaintiff,

v.

LUM'S INC., *et al.*,

Defendants.

JACOB SCHEIN and MARVIN H. SCHEIN,

Plaintiffs,

v.

MELVIN CHASEN *et al.*,

Defendants.

December 15, 1971.

TYLER, *District Judge*

Defendants in these consolidated actions have moved to dismiss plaintiffs' complaints upon the ground that they fail to state a claim upon which relief can be granted. Rule 12(b) (6) F.R. Civ.P. Alternatively, all defendants move this court to stay these actions pending a final determina-

tion in *Sanders* v. *Lum's Inc. et al.*, 70 Civ. 5331, a related action pending before this court. Additionally, the individual defendants move that the complaints be dismissed as against them upon the ground that jurisdiction over their persons has not been obtained. Rules 4(e) and 12(b)(2), F.R.Civ.P.[1]

All three of these suits are derivative actions brought on behalf of Lum's Inc. ("Lum's"), a Florida corporation. Jurisdiction is claimed by virtue of diversity of citizenship. The plaintiffs' complaints are predicated on the same facts as *S.E.C.* v. *Lum's et al.*, 70 Civ. 5280, which is also pending before this court. Briefly stated, plaintiffs' claims are based on defendants' alleged misuse of confidential corporate information. The complaints charge that defendant Melvin E. Chasen, aware as president of Lum's that the firm's 1969 earnings would be lower than had been projected, telephoned from his Florida office to defendant Simon, who is employed in the Chicago, Illinois office of defendant Lehman Brothers, Inc., and told him of the earnings' decline. Simon then transmitted the information to Sit, the portfolio manager at defendant IDS New Dimensions Fund ("Dimensions"), whose offices are in Minneapolis, Minnesota. Sit then conveyed the information to defendant Jundt, a manager and analyst for IDS Variable Payment Fund ("Variable"). It is further alleged that Sit and Jundt then caused Variable and Dimensions to sell their entire holdings in Lum's just before the public announcement of the decline in the 1969 earnings caused the stock to drop several points .n trading on the New York Stock Exchange.

1. Defendants Sit and Jundt, apparently unaware that I have already granted their prior motions to dismiss by order dated October 25 of this year, once again seek the same relief. As they are no longer defendants in any of these actions, their applications will not be considered.

Opinion of the District Court
Dated December 15, 1971

Plaintiffs make no argument that any of the federal securities acts would support a claim under the facts of this case. They do argue, however, that a claim for which relief can be granted can be made out under the recent decision of the New York Court of Appeals in *Diamond* v. *Oreamuno,* 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969). Briefly stated, that case held that corporate officers who learn of a drop in corporate earnings by virtue of their fiduciary positions and sell their shares of corporate stock before publishing information as to the loss will be liable to the corporation for any profits made thereby. Plaintiffs urge that Chasen be found liable under *Diamond* even though it is not alleged that he sold any Lum's stock belonging to him and that the remaining defendants be so held under either a "tippee" or general conspiracy theory.

Three issues, thus, are presented to this court by these motions, the first being a choice of law problem. The defendants argue that under the applicable choice of law provisions, these cases should be decided by Florida law. Plaintiffs oppose and urge that their complaints be tested by New York law in general and by *Diamond* v. *Oreamuno, supra,* in particular. Assuming that *Diamond* would apply, this court would then have to determine whether the complaints herein can state a claim under the holding of that case. Finally, it must be decided whether the activities of the individual defendants fall within any of the provisions of the New York long-arm statute, CPLR § 302(a), so as to allow out of state service to be effected upon them pursuant to CPLR § 313.

In actions where jurisdiction is predicated on diversity of citizenship, this court must apply the choice of law rules of the State of New York. *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). New York follows the general choice of law principle that the law of the state of incorporation governs the existence

and extent of corporate fiduciary obligations as well as the liability for violations of such obligations. *Hausman* v. *Buckley*, 299 F.2d 696, 703 (2d Cir., 1962) and cases cited therein; *Norte & Co.* v. *Huffines*, 304 F.Supp. 1096, 1110 n.6 (S.D.N.Y., 1968). This rule was expressed in *Diamond* itself when the court stated that as regards the ". . . duties and obligations of directors and officers and their relation to the corporation and its shareholders . . . [t]he primary source of the law in this area ever remains that of the State which created the corporation." *Diamond* v. *Oreamuno, supra*, at 503, 504, 301 N.Y.S.2d at 85, 248 N.E.2d at 915.

The same result would be reached by the "grouping of contacts" approach to choice of law in tort actions as enunciated in *Babcock* v. *Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963). Under this approach, a New York court will apply the law of the state of the "strongest contacts with the cause of action." *Stockwell* v. *Reynolds & Co.*, 252 F.Supp. 215, 220 n.3 (S. D.N.Y., 1965). It appears from the pleadings that this case centers in Florida rather than in New York. Chasen, a Florida citizen, allegedly received and communicated the information from Florida. Lum's was incorporated, headquartered, and, at least theoretically, damaged in Florida. Most of the other contacts appear to be scattered about the midwest, the only contact with New York being several transactions over the New York Stock Exchange. Additionally, a New York court would give more weight to the Florida contacts under the "governmental interest" theory of choice of law enunciated in *Tooker* v. *Lopez*, 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 394 (1969), because Florida has the paramount interest in defining and enforcing fiduciary obligations owing to corporations incorporated and doing business within its borders. Accord-

ingly, I find that under any conceivable test, a New York court would apply Florida law to this case.

Under present Florida case law, a plaintiff in a derivative action must prove that the corporation has been damaged by the alleged breach of fiduciary trust. Although the highest court in that state has apparently not considered the matter, several District Courts of Appeal have held on various occasions that a complaint which fails ". . . to indicate both wrongful acts and damage to the corporation" must be dismissed. *Palma* v. *Zerbey,* 189 So. 2d 510, 511 (Fla.App., 1966), cert. denied 200 So.2d 814. (and cases cited therein.)

While it is apparently required that the damage to a corporation be alleged, the Florida cases shed no light on the specificity required for pleading corporate damage. Thus, though the Gildenhorn and Gregorio complaints might be insufficient under Florida law for failing to allege any damage to the corporation at all, the Schein complaint, which contains only a bare allegation that Lum's was damaged, might conceivably be held to be sufficient by a Florida court. Furthermore, I am not unmindful of the possibility that, were a Florida court to hear this case, *Diamond* v. *Oreamuno, supra.,* would be argued to it. Because of the possibility that the *Diamond* rationale might be followed in Florida, it is desirable that this court determine whether these complaints state a claim under *Diamond* for which relief can be granted.

It is clear that the complaints in these actions go far beyond the narrow holding of *Diamond.* In that case, the New York Court of Appeals held that a corporate fiduciary is liable for profits which he realizes from a sale of stock motivated by inside information received by him in his corporate position. None of the defendants in these actions fit into this mold. Chasen, as president and chief operating officer of Lum's, was certainly a fiduciary of that corpo-

ration. None of the complaints, however, allege that he did anything more than pass the inside information to defendant Simon, and there are no allegations that Chasen sold any of his Lum's stock or derived any gain, monetary or otherwise, from the sales that ultimately occurred. On the other hand, the mutual fund defendants would have profited if, as alleged, they sold their 83,000 shares of Lum's stock on the basis of Chasen's inside information. It can scarcely be maintained, however, that the mutual fund defendants were officers or directors of Lum's or owed any fiduciary duties whatsoever to that corporation. The broker-dealer defendants fail to come within either of the *Diamond* perimeters as they were not fiduciaries of the corporation and, did not profit by virtue of the sales.

Plaintiffs, of course, urge a more expansive view of *Diamond*. They point to portions of the opinion indicating that the purpose of the holding was to protect the corporation's interest in ". . . maintaining a reputation of integrity, an image of probity, for its management and in insuring the continued public acceptance and marketability of its stock." *Diamond* v. *Oreamuno, supra,* at 499, 301 N.Y.S.2d at 82, 248 N.E.2d at 912. Thus, say plaintiffs, if the purpose of *Diamond* is to maintain a corporation's integrity on the securities exchanges, it should make no difference whether an officer or director sells his own stock or passes the inside information to others who in turn sell their stock and profit thereby. While the harm done to the corporation might be equal in either instance, there is evidence that *Diamond* was not intended to cover the latter situation. As Chief Judge Fuld explained, the purpose of that derivative action was to allow individual shareholders to be ". . . 'private Attorney General[s]' to . . . enforce proper behavior on the part of corporate officials." *Diamond* v. *Oreamuno, supra,* at 503, 301 N.Y.S.2d at 85, 248

N.E.2d at 915. It is implicit that the jurisdiction of these "private attorney generals" would be limited to the corporation in which they are shareholders. It could not, with any logic, be extended in a derivative action to cover outside individuals, corporations, or institutions who are subject to other private and governmental restraints on their behavior. Furthermore, in affirming the dismissal of the *Diamond* complaint against other board members who were alleged to have aided the defendants in concealing their activities, the New York Court of Appeals made it quite clear that *Diamond* extends only to corporate fiduciaries who actually profit by inside information and does not cover aiders and abettors and/or conspirators. In view of the fact that the New York Court of Appeals could not bring itself to find liability for inter-corporate conspirators, I fail to perceive how this court could extend *Diamond* to cover extra-corporate conspirators and tippees. Accordingly, I conclude that with regard to all defendants save Chasen, the complaints herein fail to state a claim for which relief can be granted.

On the other hand, Chasen, as a corporate officer, might well come within the *Diamond* holding. Although it could be plausibly argued that *Diamond* would not apply to Chasen because of the failure to allege that he sold any stock and profited thereby, it might also be maintained that a New York court could find liability in light of the numerous statements in *Diamond* to the effect that the purpose of the holding is to prevent corporate misfeasance. This question, however, need not be reached because service of process upon Chasen was improper.

In diversity actions, this court's jurisdiction is determined by the law of the State of New York. Rule 4(d)(7), F.R.Civ.P. Because Chasen is not a New York resident and was not served in New York, jurisdiction of his person depends on the New York long-arm statute, CPLR

§ 302(a). It is plaintiffs' assertion that jurisdiction was obtained over Chasen because he set in motion events which culminated with the alleged sale of 83,000 shares of Lum's stock over an exchange located in New York. While I am aware that the scope of CPLR § 302(a) has been broadly construed, I fail to see how it can be read to cover the facts in this case.

While it is settled that one can "transact business" within the meaning of CPLR § 302(a) (1) through an agent, *Parke-Bernet Galleries, Inc.* v. *Franklyn,* 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1970), a New York court would decline jurisdiction of a defendant who merely telephones a single order from outside the state. *Katz & Son Billiard Prods.* v. *Correale & Sons,* 20 N.Y.2d 903, 285 N.Y.S.2d 871, 232 N.E.2d 864 (1967). It seems obvious that Chasen, who did not place the order to sell the Lum's stock in question, did not "purposefully" avail himself "of the privilege of conducting activities" within New York, thereby "invoking the benefits and protections of its laws." *Hanson* v. *Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958).

Plaintiffs next argue that the sale of stock over a national exchange in New York was a "tortious act within the state" and that jurisdiction could be found under CPLR § 302(a) (2). While such a sale will confer jurisdiction in some cases, *Cooper* v. *North Jersey Trust Co. of Ridgewood, New Jersey,* 250 F.Supp. 237 (S.D.N.Y., 1965), CPLR § 302(a) (2) can apply only where the non-resident defendant committed the tort in New York. That the alleged tort here may have been completed or "came to rest" in New York will not confer jurisdiction unless the acts or omissions complained of also occurred in New York. *Feathers* v. *McLucas,* 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965). *Cooper* v. *North Jersey Trust Co. etc.,*

supra, is not inconsistent as the defendants in that case were physically in New York when they allegedly committed the tort there in issue. As it is nowhere alleged that Chasen committed a tortious act in New York, no jurisdiction of his person can be claimed under CPLR § 302(a) (2).

Finally, there can be no jurisdiction under CPLR § 302(a) (3). As the statute clearly states, the tortious act must cause injury to persons or property in New York. Insofar as none of the non-resident plaintiffs in these cases have alleged that any injury occurred in New York, their invocation of this provision is futile.

Defendant Chasen's motion to dismiss is granted on the ground that no jurisdiction was ever obtained of his person. Rule 12(b) (2) F.R.Civ.P. The motions of the remaining defendants to dismiss under Rule 12(b) (6) F.R.Civ.P. are hereby granted. In view of these rulings, defendants' alternative motion for a stay of these actions need not be reached.

Settle orders accordingly.

Judgment of the District Court

Dated January 5, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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70 Civil 5733 HRT

JOSEPH GILDENHORN, as Custodian for CAROL ANN GILDENHORN,

Plaintiff,

against

LUM'S INC., *et al.*,

Defendants.

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71 Civil 1925 HRT

ANTONE F. GREGORIO,

Plaintiff,

against

LUM'S, INC., *et al.*,

Defendants.

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71 Civil 4218 HRT

JACOB SCHEIN and MARVIN H. SCHEIN,

Plaintiff,

against

MELVIN CHASEN, *et al.*,

Defendants.

Defendants Investors Diversified Services, Inc., IDS New Dimensions Fund, Inc., and Investors Variable Payment

Judgment of the District Court
Dated January 5, 1972

Fund, Inc., having moved to dismiss the complaints and the amended complaint in the above entitled actions under Rule 12(b) of the Federal Rules of Civil Procedure and the defendants Benjamin Simon, Lehman Brothers, Lum's, Inc., and Melvin Chasen having joined in said motion and said motions having come on to be heard before the Honorable Harold R. Tyler, United States District Judge, on November 19, 1971, and the Court having considered the papers submitted on said motions, having heard argument of counsel, and having issued an Opinion dated December 15, 1971 granting said motions, it is hereby

ORDERED that the above entitled actions be and they hereby are dismissed with prejudice, and without costs.

Dated: New York, New York
January 5, 1972

H. R. TYLER, JR.
U.S.D.J.

Opinions of the Court of Appeals

Dated May 10, 1973

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 81 and 82—September Term, 1972.

(Argued October 17, 1972 Decided May 10, 1973)

Docket Nos. 72-1373, 72-1375

JACOB SCHEIN and MARVIN H. SCHEIN,

Plaintiffs-Appellants,

v.

MELVIN CHASEN, INVESTORS DIVERSIFIED SERVICES, INC., LEHMAN BROTHERS, INVESTORS VARIABLE PAYMENT FUND, INC., BENJAMIN SIMON, IDS NEW DIMENSIONS FUND, INC., EUGENE S. SIT, JAMES R. JUNDT, and LUM'S, INC.,

Defendants-Appellees.

ANTONE F. GREGORIO, individually and as representative of all persons similarly situated as a class under Rule 23, F.R.C.P.,

Plaintiff-Appellant,

v.

LUM'S, INC., MELVIN CHASEN, LEHMAN BROTHERS, BENJAMIN SIMON, INVESTORS DIVERSIFIED SERVICES, INC., EUGENE S. SIT, and JAMES R. JUNDT,

Defendants-Appellees.

Before:

WATERMAN, SMITH and KAUFMAN,

Circuit Judges.

Opinions of the Court of Appeals
Dated May 10, 1973

Invoking the diversity jurisdiction of the court, plaintiffs in three cases consolidated below sued derivatively in United States District Court for the Southern District of New York, Tyler, *J.*, alleging that defendants were jointly and severally liable under state corporation law for the profits realized by the defendants Mutual Funds through their trading on the New York Stock Exchange in derivative defendant's stock on the basis of non-public material inside information. An order granting summary judgment was granted to defendants and in two of the consolidated actions the parties have argued appeals.

Reversed and remanded for further proceedings consistent with this opinion.

WATERMAN, *Circuit Judge:*

Plaintiffs-appellants are stockholders in Lum's, Inc., a Florida corporation primarily engaged in restaurant franchising. Invoking the diversity jurisdiction of the court, they sued derivatively in the Southern District of New York alleging that the defendants were jointly and severally liable to Lum's for actionable wrongs which the defendants had committed against Lum's. The individual defendants were Melvin Chasen, a resident of Florida, president of Lum's, Benjamin Simon, a stockbroker employed in Chicago, Ill. by defendant Lehman Brothers, Eugene S. Sit, portfolio manager of defendant IDS New Dimensions Fund, Inc., a Mutual Fund, and James R. Jundt, manager of defendant Investors Variable Payment Fund., Inc., a Mutual Fund. Each of the four individual defendants moved for dismissal on the ground that they had not been validly served under the New York Long Arm Statute (CPLR §§ 313, 302(a)) and that the court below had no personal jurisdiction of them. Sit's and Jundt's motions were granted prior to the filing of the

order appealed from, Chasen's was granted concurrently therewith, and Simon's has apparently not been acted upon.[1] The defendants Lehman Brothers, a partnership engaged in stock brokerage and investment counseling, the three corporations, engaged in managing investment portfolios and in buying and selling the corporate securities of publicly held corporations, Chasen, and Simon, all moved for dismissal on the ground that the complaints failed to state a cause of action under Florida law. Plaintiffs claimed that New York law should govern the rights and liabilities of the parties, and that even if Florida law were the applicable law they should still prevail. Holding that Florida law was the proper state law to apply, Judge Harold R. Tyler, Jr., by written order, *sub nom Gildenhorn* v. *Lum's, Inc.*, opinion reported at 335 F.Supp. 329 (SDNY 1971), granted the motion to dismiss for failure to state a claim upon which relief could be granted.

On this appeal plaintiffs claim only that Judge Tyler erred in dismissing the complaints for failure to state a cause of action.[2] They do not appeal Judge Tyler's order dismissing Chasen as a defendant or his finding that the substantive law of Florida governs the action.[3] Inasmuch

[1] Plaintiffs-appellants have not appealed the order dismissing the actions against Chasen, Sit and Jundt. Simon filed a similar dismissal motion but the trial court did not decide it. Simon was dismissed as a defendant by the court's order dismissing the complaints against all defendants for failure to state a cause of action under 12(b)(6) of the Fed. R. Civ. P. Simon contends on this appeal that irrespective of our action on the lower court's dismissal of the complaints under 12(b)(6), we should dismiss the action against him because he has not been validly served. However, inasmuch as the trial court has not reached this question, we decline to address it on this appeal, and leave its resolution to the trial court upon remand.

[2] In one of the original actions consolidated below, *Gildenhorn* v. *Lum's, Inc.*, 335 F.Supp. 329 (SDNY 1971) a notice of appeal was filed by plaintiff but the parties have not progressed the appeal.

[3] The parties now agree that the substantive law of the State of Florida governs the action for reasons which are stated in Judge Tyler's opinion reported at 335 F.Supp. 329 (SDNY 1971).

as the court is passing only upon the sufficiency of the complaints, we necessarily accept the allegations of the complaints as true. For reasons which follow, we hold that the complaints do state a cause of action and we reverse the judgment below and remand to the district court for further proceedings there in the light of this holding.

The facts alleged in this case fall within the perimeter of the much-discussed problem of unfair trading in corporate securities. In November of 1969 Chasen, who was president and chief operating officer of Lum's addressed a seminar of about sixty members of the securities industry with reference to Lum's earnings prospects for its fiscal year ending July 31, 1970. He informed them that Lum's earnings would be approximately $1.00 to $1.10 per share. On January 5, 1970 he learned that this estimate was too optimistic and that, in fact, Lum's earnings would be only approximately $.76 per share. Three days later, prior to announcing the information to the public, Chasen telephoned Simon in Chicago and told Simon that Lum's would not have as profitable a year as had been expected. He specified to Simon that earnings would be approximately $.76 per share rather than the $1.00 per share which he had earlier announced. Simon knew the information was confidential corporate property which Chasen had not given out publicly. Simon immediately telephoned this information to Sit, an employee of defendant Investors Diversified Services, Inc. (IDS),[4] and Sit immediately telephoned it to Jundt, another employee of IDS. Sit and Jundt managed the stock portfolios of defendant mutual funds Investors Variable Payment Fund, Inc. (Investors) and IDS New Dimensions Fund, Inc. (Dimensions). Upon receiving the

[4] Defendant IDS is a Minnesota corporation licensed to do business in the State of New York. IDS is the distributor and investment advisor for a number of large mutual funds including defendants Investors and Dimensions. Sit and Jundt are employed by IDS to manage the stock portfolios of Investors and Dimensions.

information Sit and Jundt directed the Funds to sell their entire stock holdings in Lum's and, on the morning of January 9, 1970, prior to any public announcement, Investors sold 43,000 shares of Lum's and Dimensions sold 40,000 shares. The sales were executed on the New York Stock Exchange at about 1:30 A.M. at a price of approximately $17.50 per share. At 1:30 P.M. on the same day, the New York Stock Exchange halted further trading in Lum's stock pending a company announcement. At 2:45 P.M. Lum's issued a release which appeared on the Dow Jones News Wire Service and announced that the corporation's projected earnings would be lower than had been anticipated. When trading in Lum's was resumed on Monday, January 12, 1970, volume was heavy and the stock closed at a price of $14.00 per share—$3.50 per share lower than the Funds had realized from the sales of their shares on the previous Friday.

The present defendants in this case are Lehman Brothers, Simon, and the two Mutual Funds. Chasen, Sit, and Jundt have been dismissed as defendants in that they have not been validly served under the New York State Long Arm Statute. Plaintiffs-appellants' theory of recovery is that the participants in this chain of wrongdoing are jointly and severally liable to the corporation under Florida law for misusing corporate information to their own advantage in violation of the duty they owed to Lum's, and that they must account to Lum's for the profits realized by the Mutual Funds. They do not allege in these complaints that defendants have violated any of the federal securities laws,[5] and they concede that the substantive law

[5] Lum's could apparently not prevail as a plaintiff in a Rule 10b-5 action in that it has not traded in its securities on its own account. See *Birnbaum* v. *Newport Steel Corporation*, 193 F.2d 461 (2 Cir. 1952), cert. denied, 343 U.S. 956 (1952). Although there are federal securities law cases pending against defendants in district court, this fact is irrelevant upon the appeal.

of Florida governs the rights and liabilities of the parties. They urge, however, that inasmuch as there are no Florida cases directly in point, the Florida court, if it were deciding the case, would look to other jurisdictions and would take a particular and special interest in the decision of *Diamond* v. *Oreamuno*, 29 A.D.2d 285, 287 N.Y.S.2d 300 (1st Dep't 1968), *aff'd* 24 N.Y.2d 494, 301 N.Y.S.2d 78 (1969), a case which plaintiffs contend supports the position they urge on this appeal.

The first question which our court must consider is whether we may look to the New York decision of *Diamond, supra,* as persuasive authority. Ideally, the federal court sitting in a diversity action applies the applicable state law as it has been enunciated by the highest court in the state. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938); *Hausman* v. *Buckley*, 299 F.2d 696 (2 Cir. 1962), *cert. denied*, 369 U.S. 885 (1962). However, in the absence of a clearly enunciated state rule, the federal court may turn to the law of other jurisdictions for assistance in determining how the state court would most likely decide the case if the state court were presented with the questions being litigated in the federal court. *Baxter* v. *Lancer Industries, Inc.*, 213 F.Supp. 92 (EDNY 1963), *app. denied*, 324 F.2d 286 (2 Cir. 1963); *Locke Manufacturing Companies* v. *United States*, 237 F.Supp. 80 (D. Conn. 1964). Our foray into the state law of Florida satisfies us that the Florida court has never faced the precise issues which are present in this action. Accordingly, it is both proper and practical for this court to turn for guidance to the body of law of other jurisdictions and particularly to that of New York where the resolution of the issues in the *Diamond* case, decided by the New York Court of Appeals, bears on the issues in the case before us. In doing so, our objective is to interpret *Diamond* as the Florida court would probably interpret it and

to apply *Diamond,* as so interpreted, to the facts presented here.

Diamond v. *Oreamuno, supra,* was a stockholder's derivative action in which a shareholder of Management Assistance, Inc. (MAI) charged that two of the defendants—Oreamuno, chairman of the board of directors, and Gonzales, its president and a member of the board, had used inside information acquired by them solely by virtue of their positions with MAI in order to reap large personal profits from the sale of MAI shares, and that these profits rightfully belonged to the corporation. Chief Judge Stanley Fuld, writing for a unanimous court, held that the two directors must account to the corporation for their profits for they had breached their duty to the corporation by using a corporate asset for their own personal advantage.

In this case we are asked to decide whether the *Diamond* holding should extend to reach third parties who, though not officers or directors of the injured corporation, are involved with directors in a common enterprise to misuse confidential corporate information for their own enrichment. Although there is no allegation in the complaints that a prior explicit agreement existed between Chasen and the defendants, it is obvious that the sequence of events detailed in the pleadings, if proved, will substantiate the existence of a common enterprise pursuant to which Chasen was to pass material information to Simon, Simon was to pass it to the Mutual Funds, and the Funds were to capitalize on it by selling Lum's stock prior to the time the material information was announced to and was available to the public. Cf. *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946); *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208 (1939); *Norfolk Monument Company* v. *Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700 (1969). Although defendants do not deny that they have been involved in a joint enterprise with Chasen to misuse corpo-

rate property, they argue that the doctrine of *Diamond* is not applicable here and that they cannot be held liable to Lum's because they are not Lum's fiduciaries and have not breached any duty which they owed to Lum's by cashing in on confidential information for their own advantage. Defendants Simon and Lehman Brothers make the further argument that it would be "unfair" to hold them responsible for the profits made by the Mutual Funds in that they (Simon and Lehman Brothers) did not profit personally inasmuch as neither of them traded in Lum's stock.

As a court of equity viewing the case as the Florida court would probably view it, we cannot agree that the "stretch" of *Diamond* does not reach the defendants in this case. We find nothing in the language of *Diamond* to suggest that co-venturers of the director who breaches his duty should not be subject to the same liabilities as those of the director himself for the misuse of corporate information.[6] Indeed, the general rule has always been that "one who knowingly participates in or joins in an enterprise whereby a violation of a fiduciary obligation is effected is liable jointly and severally with the recreant fiduciary." *Oil & Gas Ventures—First 1958 Fund Ltd.* v. *Kung,* 250 F.Supp. 744 (1966); see, *e.g., Jackson* v. *Smith,* 254 U.S. 586, 589 (1921); *Sexton* v. *Sword S.S. Line Inc.,* 118 F.2d 708, 711 (2 Cir. 1941); *Bankers Life and Casualty Co.* v. *Kirtley,* 338 F.2d 1006, 1013 (8 Cir. 1964). If the *Diamond* court had intended to lay down an exception to this well-

[6] We believe Judge Tyler erred in attaching dispositive significance to the fact that in *Diamond,* supra, the complaint was dismissed against certain directors who had only "acquiesced" in the wrong. The defendants-appellees here differ from the dismissed *Diamond* defendants in that the defendants-appellees were actively engaged in furthering the transaction that resulted in the "dumping" of the Lum's stock, rather than just "acquiescing" in it. Furthermore, and even more importantly, *Diamond* was not a "joint venture" case, and there is no discussion in the *Diamond* opinion as to why the complaint was dismissed against the "acquiescing" directors.

known general rule it could have done so in its opinion. Moreover, in the light of the corporate interest which the *Diamond* rule is designed to protect, it is immaterial to the preservation of that interest whether the director trades on his own account in the corporation's stock or whether he passes on the information to outsiders who then trade in the corporation's stock. In either event, so long as the director is involved, the prestige and good will of the corporation may be tarnished by the public revelation that the director has been involved in unethical conduct. *Diamond, supra* at 499; accord, *S.E.C.* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2 Cir. 1971), *cert. denied*, 404 U.S. 1005, *reh. denied*, 404 U.S. 1064 (1972). Accordingly, it would be self-defeating to limit the reach of *Diamond* to directors and officers of the injured corporation who have so acted while permitting third-party co-venturers of theirs to escape liability to the corporation.

Diamond, the law of the jurisdiction in which the New York Stock Exchange is seated, has the prophylactic effect of providing a disincentive to insider trading. It is clear that this cleansing effect ought to reach third parties who, through a breach of a fiduciary relationship, become traders advantageously possessed of confidental insider knowledge. To immunize such third parties from liability to the damaged corporation would encourage insider "leaks" to outside friends and would defeat *Diamond's* purpose and effect. And, quite properly, damages for fiduciary breaches are recoverable by recourse to state law. Indeed, though the congressional policy is similar, in some cases where federal private and governmental Rule 10b-5 actions are impractical, "immunized outsiders" might escape liability altogether except for the availability of this kind of action bottomed upon the well-recognized liability of a fiduciary to those whose trust in the fiduciary has been tragically

misplaced. In view of the strong desirability of tightening the law of insider trading, we would be remiss indeed if we interpreted *Diamond* as narrowly as defendants would have us interpret it. Moreover, sitting as a court of equity, we have here an obligation to determine where the equities lie among all the litigants, *Diamond, supra* at 498, and, as between the defendants and Lum's, there can be no doubt that it would be inequitable to permit the defendants to keep the rewards of the fraud.[7]

Our view that all the participants in the common enterprise must assume the same risks of liability to the corporation as the offending director is supported by Florida case law dealing with the duty of a fiduciary to his cestui. The Florida courts have held that the duty of a fiduciary not to misuse the property of his cestui extends not only to the "technical fiduciary" but also to others who are placed in a position of trust. *Quinn* v. *Phipps*, 93 Fla. 805, 113 So. 419 (1927). The confidential relationship of a fiduciary as that relationship is spelled out in Florida law extends not only to "technical fiduciaries" but also to others who become "fiduciaries" through the acquisition of confidential information which is "owned" by someone else. See *Quinn* v. *Phipps, supra* at 420-421. When the defendants received their "tip" from Chasen, they were automatically clothed with a duty to Lum's not to use the information for their own selfish advantages. Compare *Brophy* v. *Cities Service Co.*, 31 Del. Ch. 241, 70 A.2d 5 (1949); *Ohio Oil Co.* v. *Sharp*, 135 F.2d 303 (10 Cir. 1943).

[7] This principle has been applied in analogous cases involving violations of the federal securities laws. In more than one instance, the corporation whose stock has been illegally traded has been permitted to recover conditionally in a Rule 10b-5 action because it is more equitable for it to recoup the rewards of the fraud than for the insider who profits by misusing corporate information to keep them. See *Securities and Exchange Commission* v. *Texas Gulf Sulphur*, 446 F.2d at 1308; *S.E.C.* v. *Golconda Mining Company*, 327 F.Supp. 257 (SDNY 1971).

This is firmly grounded in law and the rule is set forth in the American Law Institute's Restatement of Agency 2d § 312 (1958): "A person who, without being privileged to do so, intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal." And see Comment c to § 312:

> A person who, with notice that an agent is thereby violating his duty to his principal, receives confidential information from the agent, may be enjoined from disclosing it and required to hold profits received by its use as a constructive trustee. * * * *

Therefore, if plaintiffs can prove their allegations, it would seem that liability of the Mutual Funds to Lum's must necessarily follow. Be that as it may be, however, the defendants Lehman Brothers and Simon contend that it would be inequitable to apply the rule to them because they did not personally profit by trading in Lum's stock and they hold no profits as constructive trustees of that corporation. Nevertheless, Lehman Brothers and Simon obviously misused inside information as much as Diversified and Investors misused it, and therefore we fail to see how equity would be furthered by imposing liability only on the Funds and not on the other participants who supplied the Funds with the inside information. It is well established that the liabilities of persons engaged in a joint enterprise to commit a wrong are both joint and several liabilities and each participant is liable to account for the profits of the other participants. *Marcus* v. *Otis*, 168 F.2d 649 (2 Cir. 1948), *modified*, 169 F.2d 148 (2 Cir. 1948); *Solomon* v. *United States*, 276 F.2d 669 (6 Cir. 1960), *cert. denied*, 364 U.S. 890 (1960), *reh. denied*, 364 U.S. 939 (1961). Accordingly, we hold that it would be proper to hold Lehman Brothers and Simon just as accountable for

the profits made by their tippees Diversified and Investors as the tippees themselves.[8]

Defendants also contend that the complaints are presently insufficient because they fail to allege with sufficient particularity the damages Lum's is claimed to have suffered. This contention is without merit. Although the Gregorio complaint fails to allege any damages to Lum's, the Schein complaint contains a general allegation of damages, and we find nothing in Florida law to require anything more than a general ad damnum allegation.[9]

Defendants also urge that inasmuch as there are private Rule 10b-5 class actions for damages, *e.g.*, *Sanders* v. *Lum's, Inc., et al.*, 70 Civ. 5331 (SDNY) and an administrative suit brought by the Securities and Exchange Commission, *SEC* v. *Lum's, et al.*, 70 Civ. 5280 (SDNY), pending in federal district court, defendants might be subjected to multiple liability if they are forced to remit to Lum's the profits the Mutual Funds made on their January 9 sales. Since appel-

[8] In passing we note decisions dealing with violations of the federal securities laws which involve the imposition of liability on defendants who have occupied statuses similar to the statuses occupied by defendants in this case. Thus, in *Securities and Exchange Commission* v. *Texas Gulf Sulphur*, 446 F.2d at 1308, the same argument raised by Simon and by Lehman Brothers was raised by defendant Darke. This court held that Darke was liable as a tippor for the profits realized by his tippees. Furthermore, "tippee liability," which is analogous to the liability being imposed upon Diversified and Investors, has been established in federal cases involving violations of the securities laws. See *Ross* v. *Licht*, 263 F.Supp. 395 (SDNY 1967); *In the Matter of Cady, Roberts & Co.*, 40 S.E.C. 907 (1961).

[9] We find it unnecessary to decide whether the defendants could prevail if *neither* complaint alleged damages to Lum's. We point out, however, that Florida law is not clear on the question and *Diamond* holds specifically that an allegation of damages is not a prerequisite to a recovery. *Diamond* v. *Oreamuno, supra* at 499. The case cited by defendants for the proposition that damages must be alleged (*Palma* v. *Zerbey*, 189 So.2d 510 (Fla.App. 1966), cert. denied, 200 So.2d 814 (Fla. 1967)) is a one paragraph per curiam opinion of a lower Florida court, the Florida District Court of Appeals which, inasmuch as it fails to provide a discussion of the issues, we find to be totally unpersuasive.

lees are fully aware of these federal court actions they are well able to protect themselves from multiple liability.[10]

Preventing those who are privy to confidential inside information from using it to their own advantage has found expression in numerous cases in the federal courts dealing with violations of the federal securities laws. See *Securities and Exchange Commission* v. *Texas Gulf Sulphur*, 401 F.2d 833 (2 Cir. 1968), *cert. denied sub nom. Coates* v. *SEC*, 394 U.S. 976 (1969); *List* v. *Fashion Park, Inc.*, 340 F.2d 457 (2 Cir. 1965), *cert. denied*, 382 U.S. 811 (1965); *Wohl* v. *Blair & Co.*, 50 F.R.D. 89 (SDNY 1970); *Ross* v. *Licht*, 263 F.Supp. 395 (SDNY 1967); *Speed* v. *Transamerica Corp.*, 99 F.Supp. 808, 828-829 (D.Del. 1951), *aff'd* 235 F.2d 369 (3 Cir. 1956).

Accordingly, as to those persons found to be within the jurisdiction of the court, we reverse the order appealed from and remand the case for such further proceedings below as may be consistent with the contents of this opinion.

KAUFMAN, *Circuit Judge* (dissenting):

In my view, it is no longer debatable that trading on inside information merits universal condemnation.[1] The undesirable nature of "insider trading" is reflected in the prophylactic provisions of Section 16(b) of the Securities Exchange Act of 1934 and the more general antifraud principles of Section 10b of that Act. I fully agree with Judges Waterman and Smith that one with access to material inside information concerning a corporation's affairs who

[10] See, for example, the method employed in *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co.*, 312 F.Supp. 77, 93 (SDNY 1970), *aff'd in part, rev'd in part*, 446 F.2d 1301 (2 Cir. 1971), cert. denied, 404 U.S. 1005 (1971), reh. denied, 404 U.S. 1064 (1971).

[1] But for a contrary view, *see* H. Manne, Insider Trading and the Stock Market (1966).

knowingly purchases or sells that corporation's shares before this information has become publicly available takes unfair advantage of unknowledgeable parties to the transaction. Indeed, the factual claims contained in the complaints before us have led to two federal actions—an SEC injunctive action and a private class action under rule 10b-5—now pending in the District Court for the Southern District of New York. But the adage that hard facts make bad law is about to come true here, despite Judge, later Justice, Cardozo's warning that judges are not free agents roaming at will to create law to fit the facts. *See* The Nature of the Judicial Process 141 (1921). In the absence of any viable precedent upon which to base the totally new concept of law espoused by my brothers, it is clear that they announce an extraordinary, expansive, and incorrect reading of New York law solely because of their urge to "provid[e] a disincentive to insider trading." I agree with their objective but I question the means employed.

The court holds today that a person with no relationship whatsoever—fiduciary or otherwise—to a corporation, who trades its shares on the basis of material inside information becomes, *ipso facto,* a fiduciary of the corporation whose shares he traded and, accordingly, may be required in a *shareholders' derivative action*—not a Section 10(b) or 16(b) action—to pay his profits to the corporation. With all due respect to my brothers, the tortured reasoning to which they are compelled to resort in reaching this conclusion represents a distortion of the law of agency and the law of fiduciary responsibility in which I am unable to join. Accordingly, I dissent.

Stripped of excess verbiage, the complaints in the two consolidated stockholders' derivative actions before us make the following allegations. In January, 1970, Melvin Chasen, president of Lum's, learned that an earnings estimate of between $1.00 and $1.10 per share previously released to the

financial community was grossly inaccurate. A more realistic figure was $.76 per share. Chasen revealed this information on January 8, during a telephone conversation, to Benjamin Simon, an employee in Lehman Brothers Chicago office. Simon, in turn, disclosed the adverse news to Eugene Sit, portfolio manager of Investors Variable Payment Fund, Inc., who himself conveyed the information to James Jundt, portfolio manager of IDS New Dimensions Fund, Inc. Both Sit and Jundt are employees of Investors Diversified Services, Inc. (IDS), investment adviser to the two mutual funds. During the morning of Friday, January 9, prior to any public disclosure of the reduced earnings figure, the two mutual funds sold a total of 83,000 shares of Lum's stock on the New York Stock Exchange at a price of approximately $17.50 per share. Later that day, after the Exchange halted trading in Lum's shares, Lum's publicly announced the reduced earnings forecast. Trading did not resume until the following Monday, when the closing price fell to $14.00 per share.

It is important to note at the outset that the plaintiffs in these actions, shareholders of Lum's, do not claim to have suffered any damages themselves. Rather, these derivative suits are brought "on behalf of and for the benefit of Lum's." They seek to recover for Lum's treasury the windfall profit garnered by the IDS mutual funds, and assert that all defendants are jointly and severally liable for this amount. Thus, the proper method of analysis is not to focus on the unfairness of the mutual funds' profit at the expense of their purchasers—who have their own recourse for any wrongdoing—but on the strands of duty running to the corporation from the various individuals involved. The crux of the majority's holding is that the institutional defendants—Lehman Brothers, IDS, and the two mutual funds—and their employees—Simon, Sit, and

Jundt—are within the sweep of fiduciary principles announced in *Diamond* v. *Oreamuno*, 24 N.Y.2d 494, 301 N.Y.S.2d 78 (1969). But a careful examination of that case and the principles underlying it demonstrate that *Diamond* is wholly inapposite to this case.

In *Diamond*, the New York Court of Appeals dealt with a derivative action brought by a shareholder of Management Assistance, Inc. (MAI) against Oreamuno, chairman of the board of directors of the corporation, and Gonzalez, its president. The complaint charged that by virtue of their corporate positions, these officers knew that a supplier's price increase had caused MAI's earnings to decrease by more than 75% during a one month period. According to the allegations, the two officers sold over 50,000 MAI shares at a price of $28 per share prior to public disclosure of the adverse earnings figures, after which the price per share plummeted to $11. In reviewing the Appellate Division's refusal to order dismissal of the complaint against Oreamuno and Gonzalez, Chief Judge Fuld stated at the outset that "the question presented—one of first impression in this court—is whether *officers and directors* may be held accountable to their corporation for gains realized by them from transactions in the company's stock as a result of their use of material inside information," 24 N.Y.2d at 496, 301 N.Y.S.2d at 79 (emphasis added). A careful reading of the *Diamond* opinion reveals that Oreamuno's and Gonzalez's liability in a stockholders' derivative action was grounded solely in their having breached a fiduciary duty owed by them to MAI as corporate officials.

The inapplicability of these principles to any of the appellees[2] is readily apparent. The complaints here are

[2] As noted in the majority opinion, the only defendants remaining on appeal are Lehman Brothers, IDS, the two mutual funds, and Simon. The district court dismissed the actions against Chasen for lack of personal jurisdiction, a holding not challenged on appeal. Accordingly, this court need not comment on the nature and extent of Chasen's liability to Lum's because of his conduct.

barren of any allegation that the appellees—or Sit or Jundt —occupied any position, such as officer, director, employee, or agent, which would create fiduciary obligations to Lum's. *Compare Brophy* v. *Cities Service Co.*, 31 Del. Ch. 241, 70 A.2d 5 (1949); *Quinn* v. *Phipps*, 93 Fla. 805, 113 So. 419 (1927). Liability in *Diamond* was predicated entirely on such a relationship, and in its absence, the *Diamond* rationale for liability ceases to exist.

In an effort to bridge this fatal gap, the majority, without any basis in law or fact, reasons that the appellees were involved in a "joint" or "common enterprise" with Chasen, president of Lum's, "to misuse confidential corporate information for their own enrichment." By use of this interesting, but nevertheless fictional, theory, they seek to foist upon the appellees liability to Lum's for Chasen's improper behavior. But the facts alleged in the complaints are a far cry from the "conscious parallelism" cases, drawn from the antitrust field, cited as authority in the majority opinion; the facts simply do not comport with the concept of a joint enterprise, a term which implies the existence of a prior plan to carry out a mutually beneficial project. The complaints, read in the most favorable light to the plaintiffs, disclose nothing more than a seemingly unsolicited and haphazard revelation of certain information which was useful in making investment decisions. There are ample remedies under the federal securities laws to punish this conduct. But, I am unable to understand on what basis the majority transforms the appellees' spontaneous conduct into a nefarious, prearranged, and ongoing scheme so that "joint" or "common enterprise" principles can make them liable as fiduciaries of a corporation with which they have no relationship.

A primary authority upon which the majority relies, § 312 of the American Law Institute's Restatement of

Agency 2d, exposes the inappropriateness of holding the appellees liable to Lum's for their conduct. Section 312 provides that "A person who, without being privileged to do so, intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal." Although Comment *c* to this section speaks generally of receipt of confidential information by a third person from a principal's agent, the central element of liability is the third party's active and intentional aiding in the agent's violation of a duty owed to his principal. In this case, Chasen's duty to Lum's was to not disclose confidential corporate information. Yet there is not a word in the complaint charging that the appellees actively solicited the disclosure or that they had concocted a prearranged scheme with Chasen.[3] We are dealing here with an isolated transaction.

In the absence of any coherent legal theory, I cannot join my brothers in approving the use of the shareholders' derivative action device merely because, as my brothers candidly admit, to do so possibly may have a deterrent effect on "insider trading." Although developments in federal securities law indicate an expanding scope of liability for tippee traders, *see In re* Investors Management Co., Securities and Exchange Commission Release No. 34-9267 (Jul. 29, 1971) (SEC sanctioning of institutional investors

3. It is of no small significance that in the *Diamond* litigation, the Appellate Division affirmed dismissal of the complaint against other MAI directors—fiduciaries to the corporation—who allegedly "approved, acquiesced in or ratified" Oreamuno's and Gonzalez's transactions. 29 A.D.2d 285, 287 N.Y.S.2d 300 (1968). Despite the majority's effort in a footnote to "distinguish" this disposition, I believe the Appellate Division's action is clearly dispositive of the point before us. If the New York courts would not impose liability upon a director—a fiduciary of the corporation—who took no affirmative steps to cause or assist in a breach of a fiduciary duty by the corporation's president, I fail to see by what logic it can be urged that New York courts would hold liable a non-fiduciary who did not cause or assist in the breach.

who sold a corporation's shares after the corporation's underwriter revealed adverse earnings results to them); *cf. SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005 (1972) (affirming district court order in SEC injunctive suit, requiring a "tippor" to divest an amount equal to his tippees' profits), the impetus for developing this expanded federal law liability—whose exact nature and scope remain in a formative stage— is the need to maintain free and honest securities markets. This need appropriately is given great weight when we consider claims under the federal securities law. But it is inapposite in determining whether, *under state common law,* tippee trading is a breach of a fiduciary duty owed to the corporation whose shares are traded, and if so, whether such a breach is remediable through use of a shareholders' derivative action.

In these actions, where jurisdiction is grounded solely in diversity of citizenship, the parties and the majority agree that our duty is to apply the law of Florida. Yet because there are no pertinent Florida decisions, the majority focuses on a New York decision, *Diamond* v. *Oreamuno, supra.* Thus, liability is founded on the conclusion of two federal judges that the Florida Supreme Court, if the instant case was before it, would look to a New York decision and, in addition, would give an unprecedented expansive reading to that case.

Despite the manner in which the majority opinion convolutes the law and the facts in this case, a view that a tippee is cloaked with state law fiduciary obligations to the corporation whose shares he trades is an unknown and untenable legal concept. Neither *Diamond*—itself a significant alteration of the common law principles applicable to

an officer's or director's trading in his corporation's shares[4] —nor the law of agency support such a holding. Nothing in the majority opinion tells us why or on what grounds a New York court would hold a tippee trader liable to the corporation for his profits under common law fiduciary principles, and the court exceeds its authority by substituting its own view of what state law ought to be, for what the state law actually is.

Moreover, since the outcome of this case turns, ultimately, upon Florida law, I fail to comprehend why my brothers refuse to utilize Florida's certified question statute, Fla. Stat. Ann. §25.031.[5] This enlightened law provides for certification to the Florida Supreme Court by a federal appellate court of an unresolved question of Florida law which is determinative of a case before it and on which there are no clear, controlling Florida Supreme Court precedents. The statute states that the court, by

4. *See* Note, 1970 Wis. L. Rev. 576, 577. Although not dispositive, this fact augurs against assuming the state courts could make the broad holding so readily attributed to them by the majority.

5. The supreme court of this state may, by rule of court provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer.

This statutory authority has been implemented by Appellate Rule 4.61.

written opinion, then may answer the certified question. *See Aldrich* v. *Aldrich*, 375 U.S. 249 (1963); *Green* v. *American Tobacco Co.*, 304 F. 2d 170 (5th Cir. 1962). The uncertainty inherent in the majority's speculation over what the Florida courts would decide if faced with this novel question of tippee liability under state common law fiduciary principles in a stockholders' derivative action would be dispelled authoritatively and finally.

Accordingly, I respectfully dissent.

Judgment of the Court of Appeals
Dated May 10, 1973

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of May, one thousand nine hundred and seventy-three.

Present—Hon. STERRY R. WATERMAN
Hon. J. JOSEPH SMITH
Hon. IRVING R. KAUFMAN, Circuit Judges.

72-1373—72-1375

JACOB SCHEIN and MARVIN H. SCHEIN,
Plaintiffs-Appellants,

v.

MELVIN CHASEN; INVESTORS DIVERSIFIED SERVICES, INC.; LEHMAN BROTHERS; INVESTORS VARIABLE PAYMENT FUND, INC.; BENJAMIN SIMON; IDS; NEW DIMENSIONS FUND, INC.; EUGENE C. SIT; JAMES R. JUNDT and LUM'S, INC.,
Defendants-Appellees.

ANTONE F. GREGORIO, individually and as representative of all persons similarly situated as a class under Rule 23 FRCP,
Plaintiff-Appellant,

v.

LUM'S INC., MELVIN CHASEN, LEHMAN BROTHERS, BENJAMIN SIMON, INVESTORS DIVERSIFIED SERVICES, INC., EUGENE C. SIT and JAMES R. JUNDT,
Defendants-Appellees.

Appeal from the United States District Court for the Southern district of New York.

Judgment of the Court of Appeals
Dated May 10, 1973

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further precedings consistent with the opinion of this court with costs to be taxed against the appellees.

A. Daniel Fusaro
Clerk

Order of the Court of Appeals
Dated June 8, 1973
Denying Petition of Benjamin Simon for Rehearing in Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the eighth day of June, one thousand nine hundred and seventy-three

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JACOB SCHEIN and MARVIN H. SCHEIN,
Plaintiffs-Appellants,

v.

MELVIN CHASEN; INVESTORS DIVERSIFIED SERVICES, INC.; LEHMAN BROTHERS; INVESTORS VARIABLE PAYMENT FUND, INC.; BENJAMIN SIMON; IDS; NEW DIMENSIONS FUND, INC.; EUGENE S. SIT; JAMES R. JUNDT and LUM'S, INC.,
Defendants-Appellees.

ANTONE F. GREGORIO, individually and as representative of all persons similarly situated as a class under Rule 23 FRCP,
Plaintiff-Appellant,

v.

LUM'S INC., MELVIN CHASEN; LEHMAN BROTHERS; BENJAMIN SIMON; INVESTORS DIVERSIFIED SERVICES, INC.; EUGENE S. SIT and JAMES R. JUNDT,
Defendants-Appellees.

A petition for rehearing in banc having been filed herein by counsel for the Defendant-Appellee Benjamin Simon and no active circuit judge having requested that a vote be taken on said suggestion

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

Order of the Court of Appeals
Dated June 8, 1973
Denying Petition of Lehman Brothers for Rehearing in Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of June, one thousand nine hundred and seventy-three

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JACOB SCHEIN and MARVIN H. SCHEIN,
Plaintiffs-Appellants,

v.

MELVIN CHASEN; INVESTORS DIVERSIFIED SERVICES, INC.; LEHMAN BROTHERS; INVESTORS VARIABLE PAYMENT FUND, INC.; BENJAMIN SIMON; IDS; NEW DIMENSIONS FUND, INC.; EUGENE S. SIT; JAMES R. JUNDT and LUM'S, INC.,
Defendants-Appellees.

ANTONE F. GREGORIO, individually and as representative of all persons similarly situated as a class under Rule 23 FRCP,
Plaintiff-Appellant,

v.

LUM'S INC., MELVIN CHASEN, LEHMAN BROTHERS, BENJAMIN SIMON, INVESTORS DIVERSIFIED SERVICES, INC., EUGENE S. SIT and JAMES R. JUNDT,
Defendants-Appellees,

A petition for rehearing in banc having been filed herein by counsel for the appellee Lehman Brothers and no active circuit judge having requested that a vote be taken on said suggestion

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

Order of the Court of Appeals
Dated June 18, 1973

Denying Petition of IDS Defendants for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket Nos. 72-1373, 72-1375

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the eighteenth day of June, one thousand nine hundred and seventy-three.

Present: Hon. IRVING R. KAUFMAN
Hon. S. R. WATERMAN
Hon. J. JOSEPH SMITH, Circuit Judges.

JACOB SCHEIN and MARVIN H. SCHEIN,
Plaintiffs-Appellants,

v.

MELVIN CHASEN; INVESTORS DIVERSIFIED SERVICES, INC.; LEHMAN BROTHERS; INVESTORS VARIABLE PAYMENT FUND, INC.; BENJAMIN SIMON; IDS; NEW DIMENSIONS FUND, INC.; EUGENE S. SIT; JAMES R. JUNDT and LUM'S, INC.,
Defendants-Appellees.

ANTONE F. GREGORIO, individually and as representative of all persons similarly situated as a class under Rule 23 FRCP,

Plaintiff-Appellant,

v.

LUM'S, INC.; MELVIN CHASEN, LEHMAN BROTHERS; BENJAMIN SIMON; INVESTORS DIVERSIFIED SERVICES, INC.; EUGENE S. SIT; and JAMES R. JUNDT,

Defendants-Appellees.

A petition for a rehearing having been filed herein for counsel for the appellees Investors Diversified Services, Inc., Investors Variable Payment Fund, Inc., and IDS New Dimensions Fund, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

Order of the Court of Appeals
Dated June 18, 1973
Denying Petition of IDS Defendants for Rehearing in Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket Nos. 72-1373, 72-1375

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eigthteenth day of June, one thousand nine hundred and seventy-three,

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JACOB SCHEIN and MARVIN H. SCHEIN,
Plaintiffs-Appellants,

v.

MELVIN CHASEN; INVESTORS DIVERSIFIED SERVICES, INC.; LEHMAN BROTHERS; INVESTORS VARIABLE PAYMENT FUND, INC.; BENJAMIN SIMON; IDS; NEW DIMENSIONS FUND, INC.; EUGENE S. SIT; JAMES R. JUNDT and LUM'S, INC.;
Defendants-Appellees.

ANTONE F. GREGORIO, individually and as representative of all persons similarly situated as a class under Rule 23 FRCP,
Plaintiff-Appellant,

v.

LUM'S, INC.; MELVIN CHASEN, LEHMAN BROTHERS; BENJAMIN SIMON; INVESTORS DIVERSIFIED SERVICES, INC.; EUGENE S. SIT and JAMES R. JUNDT,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees Investors Diversified Services, Inc., Investors Variable Payment Fund, Inc., and IDS New Dimensions Fund, Inc., and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk